

**OPINION  
72-399**

July 28, 1972           (OPINION)

Mr. Thomas O. Smith  
Special Assistant Attorney General  
State Land Department  
State Capitol  
Bismarck, ND 58501

Dear Mr. Smith:

This is in response to your letter of July 19, 1972, wherein you make inquiry of this office for an opinion regarding section 35-22-13 of the North Dakota Century Code. You submit the following facts and question in your letter:

"A problem has arisen in the State Land Department which we believe requires an Attorney General's Opinion. The facts are as follows:

"The State Land Department is in the process of foreclosing a mortgage on land located in Williams County owned by Gerald and William Bergstrom. The department followed the procedure established by Chapter 35-22 (Foreclosure by Advertisement) and set a sale date. A Sheriff Certificate was prepared and sent to the Sheriff of Williams County. As part of the foreclosure costs a sheriff's fee of three dollars was included in the Sheriff's Certificate. On May 23, 1972, the Sheriff sent the Land Department a bill for \$22.50. We had a check drawn in the amount of three dollars and sent it to the Sheriff explaining that we could only pay his office that amount as specified in section 35-22-13.

"On July 3, 1972, we received a letter, along with a check enclosed from Mr. LeRoy P. Anseth, State's Attorney for Williams County stating that we must pay the \$22.50 as that is what the Sheriff can charge under section 11-15-09. On July 5, 1972, we sent the check back to Mr. Anseth and explained our position in regard to this matter.

"On July 10, 1972, we received another letter from Mr. Anseth stating that our position was unacceptable. In Mr. Anseth's letter he set forth his position quite clearly and I quote:

'I am further informing and giving my opinion to our sheriff, LeRoy Lutz, that until this bill is paid in full he should not accept from the State Land Department or the State Land Commission any papers for processing or for service until he is paid the statutory fees which he is to collect.'

"Therefore, I would request an Attorney General's Opinion as to whose position is correct in this matter. I am enclosing photocopies of all the correspondence in regard to this matter."

In the first instance we would note the provisions of section 35-22-13 of the North Dakota Century Code, which provides as follows, in part:

"FORECLOSURE - ATTORNEY'S AND SHERIFF'S FEES - DIVISION OF ATTORNEY'S FEES UNLAWFUL. On the foreclosure of any lien or mortgage by advertisement, the person commencing such foreclosure shall be entitled to tax an attorney's fee in the amount of twenty-five dollars, and the sheriff's fee shall not exceed three dollars. \* \* \* " (emphasis supplied)

At this point we would note that the statute is specific, both as to foreclosure by advertisement and as to the limitation of the sheriff's fee. We fail to see where there exists any inconsistent provision therewith in chapter 11-15 of the North Dakota Century Code, as amended, as appears to be the position of the State's Attorney. We would note that section 11-15-07 of the North Dakota Century Code, as amended, provides as follows, in part:

"COUNTY FEES. The sheriff shall charge and collect the following fees on behalf of the county:

1. \* \* \* (through) 19. \* \* \*
0. For selling real or personal property under foreclosure of any lien or mortgage by advertisement, three dollars;
1. \* \* \* " (emphasis supplied)

The foregoing section appears to be in complete harmony with section 35-12-13 insofar as the same specifies the charge that may be made by a sheriff relating to a sale under foreclosure by advertisement proceedings.

We would note that section 11-15-09 of the North Dakota Century Code, as amended, upon which the State's Attorney apparently relies, does not relate to mortgage foreclosure by advertisement but rather upon an execution or order of sale having been issued by the district court. Further, such provision applies in such instances where the plaintiff of such action bids in the subject property at such sale. This section provides as follows:

"SHERIFF'S ALLOWANCES WHEN PLAINTIFF BIDS IN PROPERTY AT SALE. When the person whose favor an execution or order of sale shall have been issued in the district court shall bid in the property sold under the execution or pursuant to the judgment, the sheriff or other person making the sale shall receive the following fee, and no more:

1. When the amount for which the property is bid in does not exceed one thousand dollars, ten thousand dollars; or
2. When the amount for which the property is bid in exceeds one thousand dollars, twenty dollars." (emphasis supplied)

In view of the foregoing provisions of law, it appears clear that in the instance of a sale in proceedings of foreclosure by

advertisement, the fee to which the sheriff becomes entitled by law is three dollars.

We would further note that only mortgages of real property executed to the manager of the Bank of North Dakota, as mortgagee, and mortgages to the manager of the Bank of North Dakota, as mortgagee, and every mortgage negotiated by the board of university and school lands to the State of North Dakota as mortgagee, can qualify to be foreclosed by advertisement. No other mortgage of real property shall be foreclosed, but must be foreclosed by action. See section 35-22-01 of the North Dakota Century Code.

Accordingly, it would appear that the law has limited the use of foreclosure by advertisement to the interests of the sovereign state and has further specified the limits and fees that may be charged by officers in conducting the sale thereof. We are therefore of the opinion that the sheriff may charge the sum of three dollars for selling real property under foreclosure of a mortgage by advertisement and no more.

We trust that the foregoing observations, comments and information will adequately set forth the opinion of this office.

Sincerely yours,

Helgi Johanneson

Attorney General